

Grounding the Frequent Filer: Successfully Dismissing Equal Employment Opportunity Complaints For Abuse of Process

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Every labor counselor seems to encounter one sooner or later: the frequent filer—the federal employee who periodically files multiple¹ or bizarre² Equal Employment Opportunity (EEO) complaints. While theoretically an agency could dismiss a case for abuse of process, rarely would the Equal Employment Opportunity Commission (EEOC) sustain such an action.³

On November 9, 1999, the EEOC issued new rules regarding the dismissal of EEO complaints for abuse of process.⁴ These rules codify the existing case law and provide additional guidance for dismissing cases for abuse of process.⁵ They apply to all federal sector complaints currently pending at any stage in the administrative process.⁶ This article, by examining the new rule's guidance and surveying the existing body of EEOC case law, provides practical advice on how to effectively dismiss meritless or abusive EEO complaints.

The New Rules

Recognizing that meritless or abusive cases cause delays in processing cases pending before agencies and the EEOC, undermine the credibility of the EEO process, and impair the rights of complainants with meritorious claims,⁷ the EEOC modified Title 29 of the Code of Federal Regulations (C.F.R.), Section 1614.107, to allow agencies to dismiss complaints for

abuse of process.⁸ The new C.F.R. provision provides that an agency shall dismiss a complaint that either alleges dissatisfaction with the processing of a previously filed EEO complaint or, using the criteria set forth in previous EEOC decisions, demonstrates a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.⁹ A clear pattern of misuse of the EEO process requires:

- (i) Evidence of multiple complaint filings;
and
- (ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or
- (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.¹⁰

The text of the new provision, however, is only part of the equation of understanding how to dismiss cases for abuse of process. Aside from the text, practitioners must figure out how to apply previous EEOC decisions regarding abusive cases.

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1. See *Hooks v. Runyon*, 1995 EEOPUB LEXIS 3339, at *5 (Nov. 28, 1995) (filing eighty-six separate EEO complaints in a single day).
 2. See *Drake v. Perry*, 1994 EEOPUB LEXIS 4860, at *1 (Dec. 22, 1994) (filing EEO complaints because he was issued a "Notice of the Right to File a Discrimination Complaint" letter and a "Notice of Receipt of Discrimination" complaint letter).
 3. See generally *Donnelly v. Pena*, 1997 EEOPUB LEXIS 4133 (Nov. 17, 1997); *Pletten v. West*, 1995 EEOPUB LEXIS 334 (Feb. 24, 1995); *Drake v. Perry*, 1995 EEOPUB LEXIS 261 (Feb. 16, 1995); *Drake*, 1994 EEOPUB LEXIS 4860; *Kleinman v. Runyon*, 1994 EEOPUB LEXIS 1321 (Sept. 22, 1994).
 4. See The U.S. Equal Employment Opportunity Commission, *EEOC Fiscal Year 1999 Accomplishments Report Shows Groundbreaking Progress on all Fronts* (last modified Dec. 27, 1999) <<http://www.eeoc.gov/press/12-27-99.html>>.
 5. See generally 64 Fed. Reg. 37,643-661 (1999).
 6. *Reisinger v. Henderson*, 1999 EEOPUB LEXIS 6601, at *1 (Nov. 16, 1999).
 7. 64 Fed. Reg. 37,643-661.
 8. *Id.*
 9. *Id.*
 10. *Id.* (emphasis added).

The Old Case Law

Prior to the new rules, there was no specific regulation that allowed the EEOC to dismiss abusive complaints. The EEOC had, however, the inherent power to protect its policies, practices, and procedures from misuse and abuse.¹¹ Historically, abuse of process within the EEO arena was defined as “a clear pattern of misuse of the process for ends other than that which it was designed to accomplish.”¹² The new rules clarify this definition by defining abuse of process as “a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.”¹³ Central to this definition is determining whether a complainant’s behavior betrays an ulterior purpose to abuse the EEO process.¹⁴ Before the new rules, the EEOC rarely dismissed a complaint for abuse of process, due to a policy consideration favoring preserving a complainant’s EEO rights whenever possible.¹⁵ Under the new rules, while there is still this desire to preserve a complainant’s rights,¹⁶ there is both an acknowledgment that there are complaints that are abusive of the EEO process and a mechanism to properly dismiss them.

What Constitutes Abuse of Process

Generally, dismissal for abuse of process is designed to protect against discrimination complaints “circumventing other administrative processes such as the labor-management dispute

process; retaliating against the agency’s in-house administrative machinery; or overburdening the EEO complaint system . . .”¹⁷ An example of where a complainant uses the EEO process as a weapon of revenge against agencies for perceived wrongs is *Fisher v. Cohen*.¹⁸ In that case, the complainant had written to the agency head with an ultimatum “demanding immediate relief and damages within ten days or he would make removal of all the ‘responsible officials’ a prerequisite ‘before there is any discussion of settling any [of his EEO] complaints, allegations and grievances.’”¹⁹ The EEOC found these comments to be evidence of his intent to retaliate and justified dismissal for abuse of process.²⁰

Another clear indication of abuse of process is the manner in which complaints are filed. In *Kessinger v. Henderson*,²¹ the complainant created a standardized form, in which he would merely “check-off” the particular basis for his complaint. The EEOC held that he was “knowingly filing repetitive complaints and appeals with the intent to clog the EEO system. He has blatantly overburdened the administrative system by filing these complaints.”²² In another case, the complainant merely submitted a photocopied complaint each time she filed.²³

Perhaps the most common indicator of abuse of process is filing a large number of *duplicate* or *repetitive* complaints.²⁴ While merely filing numerous complaints is itself not abusive of the EEO process,²⁵ many dismissed cases involve complainants who have filed fifty or more complaints, repeating the

11. *Kessinger v. Henderson*, 1999 EEO-PUB LEXIS 3065 (June 8, 1999); *Sessoms v. Runyon*, 1998 EEO-PUB LEXIS 3629, at *3 (June 11, 1998); *Story v. Henderson*, 1998 EEO-PUB LEXIS 3273, at *5 (May 22, 1998); *Haralson v. Cohen*, 1998 EEO-PUB LEXIS 1907, at *5 (Mar. 25, 1998); *Goatcher v. Runyon*, 1996 EEO-PUB LEXIS 842, at *1-*2 (Oct. 18, 1996); *Hooks v. Runyon*, 1995 EEO-PUB LEXIS 3339, at *1-*2 (Nov. 28, 1995); *Drake v. Perry*, 1995 EEO-PUB LEXIS 261, at *6 (Feb. 16, 1995) (citing *Becker v. Department of the Treasury*, EEOC Request No. 05900221 (June 15, 1990) and *Buren v. USPS*, EEOC Request No. 058550299 (Nov. 18, 1985)); *Drake v. Perry*, 1994 EEO-PUB LEXIS 4860, at *3 (Dec. 22, 1994) (citations omitted).

12. *Buren*, EEOC Request No. 05850299. See generally *Kessinger*, 1999 EEO-PUB LEXIS 3065; *Fisher v. Cohen*, 1998 EEO-PUB LEXIS 6242 (Dec. 11, 1998); *Sessoms*, 1998 EEO-PUB LEXIS 3629, at *4; *Story*, 1998 EEO-PUB LEXIS 3273, at *5; *Haralson*, 1998 EEO-PUB LEXIS 1907, at *5; *Donnelly v. Pena*, 1997 EEO-PUB LEXIS 4133, at *11 (Nov. 17, 1997); *Goatcher*, 1996 EEO-PUB LEXIS 842, at *2; *Hooks*, 1995 EEO-PUB LEXIS 3339, at *2.

13. 64 Fed. Reg. 37,643-661.

14. *Id.*

15. *Donnelly*, 1997 EEO-PUB LEXIS 4133, at *11-*12 (citing *Love v. Pullman, Inc.*, 404 U.S. 522 (1972) and *Wrenn v. EEOC*, EEOC Appeal No. 01932105 (Aug. 19, 1993)). See generally *Kessinger*, 1999 EEO-PUB LEXIS 3065; *Fisher*, 1998 EEO-PUB LEXIS 6242; *Sessoms*, 1998 EEO-PUB LEXIS 3629, at *4; *Manley v. Peters*, 1998 EEO-PUB LEXIS 3244, at *7-*8 (May 29, 1998); *Story*, 1998 EEO-PUB LEXIS 3273, at *5; *Goatcher*, 1996 EEO-PUB LEXIS 842, at *2; *Hooks*, 1995 EEO-PUB LEXIS 3339, at *2; *Drake*, 1995 EEO-PUB LEXIS 261, at *6.

16. 64 Fed. Reg. 37,643-661.

17. *Id.*

18. 1998 EEO-PUB LEXIS 6242, at *10 n.3.

19. *Id.*

20. *Id.* at *9-*10.

21. 1999 EEO-PUB LEXIS 3065, at *7 (June 8, 1999).

22. *Id.*

23. *Goatcher v. Runyon*, 1996 EEO-PUB LEXIS 842, at *5 (Oct. 18, 1996).

same allegations again and again. Filing any number of separate and distinct complaints is permitted and not objectionable, but making the same claims or arguments numerous times is abusive. For example, in *Kessinger v. Henderson*, the complainant had filed 161 redundant complaints and sixty-five class actions;²⁶ in *Hooks v. Runyon*, the complainant filed 132 redundant appeals in a four-month period, eighty-six on the same day.²⁷ Likewise, filing complaints about frivolous issues having nothing to do with EEO has been cited as another grounds for dismissing for abuse of process.²⁸ Examples include complaints that attack EEOC administrative judge rulings in other cases²⁹ or administrative forums, such as union grievance adjudications or Merit System Protection Board hearings.³⁰

Finally, failing to comply with the administrative judge's orders can also result in a finding of abuse of process. In *Fisher v. Cohen*, the complainant's refusal to submit a required affidavit, failure to comply with discovery orders, failure to provide a witness list, and insistence that the administrative judge had no jurisdiction to issue orders in the matter all contributed to the case's dismissal.³¹

What does not Constitute Abuse of Process

Just as important as understanding what has succeeded as persuasive arguments for "abuse of process" dismissals is an understanding of the arguments that have failed.

The case of *Donnelly v. Pena*³² illustrates "abuse of process" arguments that are unpersuasive. Donnelly appealed to the EEOC alleging that the Department of Energy had improperly denied her sixteen complaints of unlawful employment discrimination. Among other grounds, the agency determined that all sixteen complaints should be dismissed for abuse of process.³³

The agency presented five arguments for the dismissal of appellant's complaints for abuse of process: (1) numerosity of the complaints; (2) numerosity of the alleged responsible individuals; (3) attack on individuals responsible for processing the complaints; (4) repeated filing of identical issues; and (5) failure to prevail on the merits of any allegations.³⁴

The EEOC analyzed, and ultimately rejected, each agency argument.³⁵ First, the numerosity of complaints or of responsible individuals, by itself, has never succeeded, in an abuse of process claim.³⁶ In this case, the appellant filed numerous individual complaints instead of a single consolidated complaint. The agency could have chosen to consolidate the complaints, eliminating the numerosity issue.³⁷ By not choosing to consolidate the complaints, the agency was estopped from alleging abuse of process merely due to the number of complaints. With respect to the agency's third argument, that the complaints merely attacked the individuals responsible for processing the

24. 64 Fed. Reg. 37,643-661 (1999).

25. *Id.*

26. 1999 EEOPUB LEXIS 3065, at *2-*3 (June 8, 1999).

27. 1995 EEOPUB LEXIS 3339, at *5 (Nov. 28, 1995) (comprising seventeen appeals regarding the prior dismissal of complaints for failure to state a claim, sixty-eight for refusal to meet with her representative, eleven alleging improper EEO counseling, ten for inadequate time to file briefs, and eleven regarding the agency's denial of her requests to be anonymous).

28. *Sessoms v. Runyon*, 1998 EEOPUB LEXIS 3629, at *6 (June 11, 1998); *Goatcher*, 1996 EEOPUB LEXIS 842, at *6; *Hooks*, 1995 EEOPUB LEXIS 3339, at *6.

29. *Sessoms*, 1998 EEOPUB LEXIS 3629, at *6.

30. *Burns v. Henderson*, 1999 EEOPUB LEXIS 5519, at *2 (Oct. 8, 1999).

31. 1998 EEOPUB LEXIS 6242, at *4 (Dec. 11, 1998).

32. 1997 EEOPUB LEXIS 4133 (Nov. 17, 1997).

33. *Id.* at *11.

34. *Id.* at *12.

35. *Id.* at *12-*15.

36. *Id.*; *Kleinman v. Runyon*, 1994 EEOPUB LEXIS 1321, at *25-*26 (Sept. 22, 1994) (noting forty-seven appeals of final agency decisions dismissing his complaints and seventeen requests for reconsideration before the EEOC in a three year period); *Drake v. Perry*, 1994 EEOPUB LEXIS 4860 (Dec. 22, 1994) (citing *Becker v. Department of the Treasury*, EEOC Request No. 05900221 (June 15, 1990)); 64 Fed. Reg. 37,643-661 (1999) (noting that evidence of numerous complaint filings, in and of itself, is an insufficient basis for making a finding of abuse of process).

37. *Donnelly*, 1997 EEOPUB LEXIS 4133, at *12; 29 C.F.R. § 1614.606 (1999).

complaints, the EEOC held that the complaints in fact raised substantive claims and not merely frivolous claims lodged against the EEO complaint procedures.³⁸

While the agency alleged that the appellant filed complaints raising the same allegations, the EEOC found that the similarities in the issues were how the agency defined them, and not a scheme by the appellant to submit identical complaints.³⁹ It also rejected the agency's assertion that the appellant's failure to prevail on the merits with previous allegations made the current complaints abusive of the EEO process.⁴⁰ A complaint of discrimination cannot be discounted merely because of an appellant's previous failures.⁴¹

Ultimately, for a complaint to be dismissed for abuse of process, the complainant's actions must be willful and not merely unreasonable.⁴² Starting with its decision in *Wrenn v. Department of Veterans Affairs*, the EEOC has held that "[t]he elements of abuse of process include, in addition to the ulterior purpose to misuse the process, a willful act that is not proper in the regular conduct of the proceeding."⁴³ As long as the complainant is participating in the EEO process in good faith, his conduct will not amount to "abuse of process" even if it is unreasonable.⁴⁴ In the past, the EEOC has been extremely tolerant and hesitant to dismiss complaints for abuse of process.⁴⁵ In all likelihood, this hesitation will continue.⁴⁶

Practice Pointers

Labor counselors should be aware of several factors when attempting to argue abuse of process. First, under the new

rules, to find abuse of process there must be multiple complaint filings.⁴⁷ The first EEO complaint, no matter how frivolous or retaliatory, can not be dismissed for abuse of process under the new rules. Second, if abuse of process is to be used as an argument for dismissal it must be raised in the initial agency decision to dismiss the complaint and not for the first time on appeal with the EEOC.⁴⁸

Third, labor counselors should examine previous decisions regarding the complainant. In many instances where the EEOC ultimately did not find abuse of process, it will nevertheless put the complainant on notice that future complaints would be dismissed if abusive.⁴⁹ Sometimes, these notice provisions can be very specific. In the case of *Becker v. Department of the Treasury*,⁵⁰ the appellant

[W]as put on notice that future appeals would be summarily dismissed if: (1) appellant failed to timely bring to the attention of the EEO Counselor a specific matter (e.g., a non-selection for a specific vacancy for which he applied); (2) appellant failed to specify the date of the alleged discriminatory event, the effective date of an alleged personnel action, or the date he knew or reasonably should have known of the discriminatory event or personnel action; and (3) a written complaint was not submitted to an appropriate official within 15 calendar days of his receipt of a notice of the right to file a complaint.⁵¹

38. *Donnelly*, 1997 EEOPUB LEXIS 4133, at *13.

39. *Id.* at *13-*14.

40. *Id.* at *14.

41. See *infra* note 54 and accompanying text.

42. *Pletten v. West*, 1995 EEOPUB LEXIS 334, at *9 (Feb. 24, 1995).

43. *Id.* (citing *Wrenn v. Department of Veterans Affairs*, EEOC Request No. 05920705 (April 2, 1993)).

44. *Id.* at 12.

45. See generally *Kleinman v. Runyon*, 1994 EEOPUB LEXIS 1321 (Sept. 22, 1994) (holding in this instance that complaints unrelated to employment, duplicate complaints, and collateral challenges to agency actions are merely "suggestive" of abuse of process).

46. 64 Fed. Reg. 37,643-661 (1999). The EEOC will continue to require strict adherence to abuse of process criteria. *Id.*

47. *Id.* Multiple accusations of discrimination are not enough. The use of "and" in subsection (i) clearly indicates that multiple complaint filings is required for a finding of abuse of process. *Id.*

48. *Pletten v. Walker*, 1998 EEOPUB LEXIS 1087, at *3 (Feb. 10, 1998).

49. *Drake v. Perry*, 1994 EEOPUB LEXIS 4860, at *4 (Dec. 22, 1994); See *Pletten v. West*, 1995 EEOPUB LEXIS 334, at *13 n.5 (Feb. 24, 1995) (advising that continued raising of meritless complaints could at some point be characterized as an abuse of process); *Nicoloudakis v. Henderson*, 1998 EEOPUB LEXIS 5714, at *3 (Oct. 27, 1988).

50. EEOC Request No. 05900221 (June 15, 1990).

If the complainant has been previously warned about potential abuse of process, it should be advocated in subsequent motions to dismiss. Merely because a previous case contains a notice provision, however, is no guarantee that subsequent complaints will be successfully dismissed for abuse of process.⁵²

Fourth, previous findings of abuse of process can also be used. While a previous finding, by itself, does not prove that a current complaint is abusive, it nevertheless can be used to support the proposition. In *Kessinger v. Henderson*,⁵³ the EEOC in determining abuse of process, noted that twenty requests for consideration and fifty appeals of the complainant had been previously dismissed for abuse of process.⁵⁴

Fifth, the argument for dismissing for abuse of process can be stronger based on the sophistication of the complainant. The more the complainant has used the EEO process, their knowledge and experience makes abusive behavior less excusable.⁵⁵

Finally, labor counselors should pay close attention to complaints filed by former employees, focusing on the time between the end of employment and the filing of the complaint. In *Kleinman v. Runyon*, almost three years had elapsed since the appellant ceased working for the agency and when he filed the complaint.⁵⁶ As time goes by,

[T]he ability of appellant to assert allegations of discrimination relating directly to his employment will and has diminished. Accordingly, the Commission will examine

carefully allegations of discrimination that appellant presents on appeal or in requests for reconsideration in order to determine whether they relate to employment or concern matters sufficiently removed from the work place as to be indicative of abuse. If the latter, the Commission will not hesitate to impose the sanction identified in *Buren* as appropriate in such circumstances, that is, the summary dismissal of appeals and requests for reconsideration filed by appellant with the Commission.⁵⁷

Allegations of abuse of process can therefore be bolstered if there is a lag between employment and the complaint.⁵⁸

Conclusion

The EEOC has taken two important steps in combating abuse of the EEO process. First, it recognized the magnitude of the problem. Second, by modifying 29 C.F.R. § 1614.107 and providing additional guidance, it clarified how complaints should be dismissed for abuse of process. Labor counselors must take the third and final step and identify those complaints that are abusive and work to get them removed from the EEO process. Pursuing complaints that are abusive may some day make the frequent filer a thing of the past, and make the entire EEO process more efficient, effective, and fair.

51. *Id.*

52. See the various appeals of Richard Becker against a variety of agencies, beginning with *Becker v. Department of the Treasury*, EEOC Request No. 05900221 (June 15, 1990), in which he was warned that under certain circumstances, future appeals would be summarily dismissed if meritless. This case is cited, and he is warned again, in several subsequent EEOC decisions, but never with a finding of abuse of process. See *Becker v. Brown*, 1997 EEOPUB LEXIS 373, at *2 (Feb. 21, 1997); *Becker v. Brown*, 1997 EEOPUB LEXIS 204, at n.1 (Feb. 28, 1997); *Becker v. Summers*, 1999 EEOPUB LEXIS 5593, at *3 n.1 (Oct. 6, 1999).

53. 1999 EEOPUB LEXIS 3065, at *2-*3 (June 8, 1999).

54. *Id.* (citing *Kessinger v. USPS*, EEOC Request No. 05970898 (Jan. 4, 1999)). See *Fisher v. Cohen*, 1998 EEOPUB LEXIS 6242 (Dec. 11, 1998).

55. See generally *Sessoms v. Runyon*, 1998 EEOPUB LEXIS 3629, at *6 (June 11, 1998); *Card v. Runyon*, 1996 EEOPUB LEXIS 3573, *5-*6 (Oct. 25, 1996) (stating "We are, moreover, not unmindful that appellant is not a novice in regard to the EEO complaint process. The Commission takes notice, for example, that in an eight-month period (January 1995 - September 1995) thirty-five decisions were issued on appellant's appeals from agency dismissals").

56. *Kleinman v. Runyon*, 1994 EEOPUB LEXIS 1321, at *7 (Sept. 22, 1994).

57. *Id.* (citations omitted).

58. See *Fisher*, 1998 EEOPUB LEXIS 6242, at *9 (observing in a decision to dismiss for abuse of process that all but four of the complainant's cases were decided after his removal from agency employment; appeal of removal was lost before the Merit Systems Protection Board; appeal of that decision was dismissed in federal district court over four years prior to the instant complaint).